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BOOK REVIEW — The Federal Courts: Challenge and Reform

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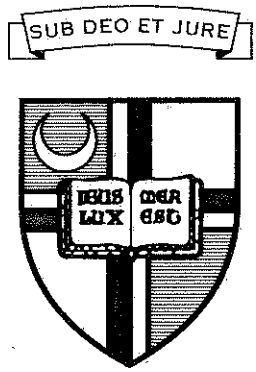

BOOK REVIEW

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THE FEDERAL COURTS: CHALLENGE AND REFORM. By Richard A. Posner. Cambridge, Massachusetts & London, England: Harvard University Press, 1996. Pp. xiv, 413.

*Honorable Roger J. Miner**

This book is a follow-up and partial revision of a book entitled *Federal Courts: Crisis And Reform*, published a decade ago. According to the author, the word "Crisis" in the original title has been replaced by "Challenge" because it now is apparent to him that the situation of the federal courts is not critical, although it may reach that point sometime in the future. The author's thesis is that the federal courts have been successful in coping with their increasing caseloads, and that it therefore is inaccurate to identify any present crisis in the functioning of the federal court system. He had it right the first time, and that was ten years ago. The situation has been deteriorating for many years and, although the courts have been attempting to cope by using various methods to accommodate the growing caseload traffic, the problems associated with volume largely remain unresolved. The greatest of these, the adverse effect on the quality of justice, receives scant attention in this book.

The most recent statistical report from the Administrative Office of the United States Courts merely reflects a long-term trend:

> In FY96, the number of appeals filed in the 12 regional courts of appeals rose 4 percent to 51,991. This was an all-time high in filings, with eight circuits reporting increases. In FY96, 934 appeals were filed per authorized three-judge panel, up 35 from the preceding year. Consistent with an FY95 growth in criminal filings related to fraud and drugs in district courts, criminal appeals rose 7 percent last year. . . .
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> Civil appeals rose 6 percent in 1996, due largely to a 13 percent increase in prisoner petitions and a 17 percent increase in employment civil rights appeals. . . .
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> There are 167 authorized judgeships in the 12 regional courts of appeals available to handle the record level of work; as of March 1, 1997, 26 of the judgeships were vacant.

* Senior Judge, United States Court of Appeals for the Second Circuit; Adjunct Professor of Law, Albany Law School.

> In FY96, total filings in the U.S. district courts rose 8 percent, from 294,123 to 317,021. Caseload has not been this high since FY85, when filings peaked at 391,685.
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> Both civil and criminal case filings increased. Civil filings increased 8 percent, going from 248,335 to 269,132, largely because of a growth in private cases (i.e., those in which the U.S. government is not a party) concerning diversity of citizenship and federal question jurisdiction (i.e., the federal courts' interpretation and application of the United States Constitution, acts of Congress, or treaties). . . .
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> For more than 50 years, the federal Judiciary has applied a system of weights to filings as a means of accounting for differences in the time required for district judges to resolve various types of civil and criminal disputes. In 1996, the total number of weighted filings per authorized judgeship was 472, up 24 from the 1995 level. There are 647 authorized district court judgeships, but 67 of these positions were vacant as of March 1, 1997, 19 of them for more than 18 months.[1]

The author recognizes the "dramatic" increases in the caseloads of the federal courts since 1960. Between 1960 and 1983, for example, the number of cases filed in the district courts increased more than threefold, although the number of criminal cases filed increased by "only" 27 percent.[2] During this same period, appeals from district court decisions filed in the courts of appeals increased by 789 percent![3] Analyzing the situation of the federal courts between 1983 and 1995, the author finds that the total district court caseload is largely unchanged, although criminal cases have increased and now are a higher percentage of the total caseload.[4] However, the most recent statistics, set forth above, signal the resumption of an upward trend in the district courts. As for the courts of

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1. *Federal Courts' Caseload Continues Upward Spiral*, THE THIRD BRANCH, Mar. 1997, at 4, 4-5. One month later, total Article III vacancies stood at 97. These seats have been vacant for an average of 15 months, and some have been vacant for as long as 76 months. *See Judicial Vacancies and Confirmations: Past and Future*, THE THIRD BRANCH, Apr. 1997, at 1, 4.

2. *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 59 (1996).

3. *See id.*

4. *See id.* at 63-64.

appeals, the author recognizes a growth in the caseload from 29,580 in 1983 to 49,625 in 1995, with caseload composition changing from 19.2 percent to 23.2 percent for criminal appeals.[5] The most recent statistics reveal no let-up in the growth of federal court dockets. Over a 5-year period ending in Fiscal Year 1996, total filings in the courts of appeals have increased 10.5 percent. During the same period, civil filings in the district courts have increased 16.8 percent, although criminal filings have declined by approximately one percent.[6] The mix of cases changes, but the upward trend in volume does not.

Although the federal judiciary applies a system of weights to account for time differences in resolving district court cases, the system applies only to filings, and the author makes the valid point that filings represent only caseloads, and are not a true measure of actual workloads.[7] He suggests that workloads could be measured by the number of cases terminated after some court action in the district courts.[8] He observes that court of appeals statistics are based on the number of notices of appeal filed, and that more than one-half of the civil appeals are disposed of without full briefing.[9]

Even measured by workload, rather than caseload, however, the increased burden on the federal courts has been enormous. In seeking to minimize this fact, the author notes that, despite the increase in the average number of court of appeals opinions over the years, the increase in merits terminations per active judge is much greater than the increase in the number of signed opinions per circuit judge; that the fraction of difficult cases in the courts of appeals is falling (difficulty being measured by likelihood of signed opinions); that a rapid fall in the reversal rate is indicative of less time spent on a case because affirmance is "the easy way out"; and that the lower percentage of appeals from cases actually tried in the district courts (comparing 1960 and 1983) makes for shorter records, resulting in less reading and a lightened decision-making burden.[10]

It goes without saying that workload can be measured only by hours spent on the work. Therefore, the increase in merits terminations without signed opinions, in conjunction with the increase in the number of signed opinions, does not in any way demonstrate an amelioration in workload. Quite the contrary. Experience as a circuit judge belies the

5. *See id.* at 64.
6. *See Federal Courts' Caseload*, *supra* note 1, at 6.
7. *See* POSNER *supra* note 2, at 64.
8. *See id.* at 66.
9. *See id.* at 67.
10. *See id.* at 74-75.

author's conclusion that the fraction of difficult cases in the courts of appeals is declining, by whatever standard is used. There are many more cases, and no decrease in percentage of difficulty has been noted in the universe of cases. Moreover, to say that a decline in the reversal rate is somehow indicative of less workload because affirmance is the easy way out runs contrary to practical experience. Long hours can be spent on a case that winds up in affirmance, either by opinion or summary order, while reversal sometimes requires less time. Generalizations do not provide a good approach to work that involves so many variables.

In a similar vein, fewer cases on appeal from determinations made after trial, and smaller records, do not mean that fewer hours are spent. A case may include many complex legal issues and require extensive research and writing even when decided on appeal from summary judgment or dismissal for failure to state a claim. To say otherwise is to rely on the ipse dixits and questionable extrapolations of statistics with which this book is larded.

Despite the uncontroverted increase in caseloads *and* workloads undertaken by federal judges whose retired and deceased colleagues are not replaced because of the breakdown in the process of advice and consent,[11] the federal courts are coping, says the author, and coping fairly well at that. I suppose that it all depends on what one means by coping. The principal means, according to Judge Posner, is the expansion in the number and responsibilities of supporting personnel, including bankruptcy judges, magistrate judges, law clerks, staff attorneys, and law student externs.[12]

Properly noted here is the need for judges, burdened by crushing caseloads, to have clerks undertake more and more opinion drafting responsibilities. Also properly noted are the many drawbacks of a system that requires clerks to write even the first drafts of opinions.[13] On balance, however, the author believes that opinion writing by clerks is acceptable because they "have better legal analytic capabilities" than the judges they serve.[14] If a federal judge does not have better analytic capabilities than a just-graduated clerk, the system is in even deeper trouble than anyone believes. The concept, of course, is nothing short of ridiculous, as is the statement that law students should be taught that in their briefing and submissions to federal courts, they will be writing for

11. *See* Roger J. Miner, *Advice and Consent in Theory and Practice*, 41 AM. U. L. REV. 1075, 1082-83 (1992).

12. *See* POSNER, *supra* note 2, at 131-32.

13. *See id.* at 141-59.

14. *Id.* at 157.

law clerks, and not for judges. To most lawyers and judges, increased reliance on inexperienced law clerks is just not good coping.

Discussed at some length are other methods being used to cope with federal court volume—curtailment of oral arguments and non-publication of opinions in the courts of appeals, and the increased granting of summary judgment and motions to dismiss and the imposition of sanctions in the district courts.[15] Taking into account these and other consequences of volume, Judge Posner poses this question: "[H]ave these consequences, which range from a massive increase in staff to a significant reduction in process, caused a substantial degradation in the quality of the federal judiciary and federal justice?"[16] The author's answer is "No," although one wonders why the question is posed in terms of *substantial* degradation. A little degradation would be scary enough. In any event, the author acknowledges that his view, that the system is not worse overall for the consequences described, is "heresy."[17] He writes:

> The idea that the nation will suffer if judges do not have as much time for each case as they once did is integral to the ideology of the American legal profession. Indeed, it is entwined with the central strand of that ideology—the conception of law, in all its aspects including judging, as a craft of patient artisans.[18]

It is not only the legal profession that sees law and judging as a craft of artisans. It is the expectation of all Americans that judges will spend as much time as necessary to craft just decisions in legal disputes. This is not "artisanship," but the method we follow in the search for elusive justice. Implicated in the search are the hopes and dreams of the American people, matters that do not loom large in this book.

Part III of *The Federal Courts: Challenge and Reform*, entitled "Incremental Reform," is largely devoted to "palliatives," which the author describes as proposals unlikely to have more than a limited effect on caseloads.[19] Included here are the pros and cons of such frequently discussed measures as "non-trivial fixed user fee[s],"[20] limiting or abolishing diversity jurisdiction, better management, alternative dispute resolution, and reform of the bar, which includes such time-worn topics as contin-

15. *See id.* at 160-85.
16. *Id.* at 185.
17. *See id.*
18. *Id.*
19. *Id.* at 194.
20. *Id.* at 198.

gent fees and two-way fee shifting.[21] Part III concludes with a non-innovative discussion of specialized courts and various proposals for changes in the administrative review process.[22] The reader therefore waits anxiously for the presentation of new ideas promised by the title of the final part of the book, Part IV, "Fundamental Reform." One waits in vain, being treated instead to some philosophical ruminations, some "on the one hand/on the other hand" proposals and some suggestions with practically no chance of adoption.

The first chapter under "Fundamental Reform" reviews the federal courts' role in our federal system, describing, as so many have done in the past, the dual system of courts that prevails in this nation and the relationship of those courts to one another.[23] This discussion is almost as repetitious of existing literature as that found in Part I of the book, which deals with the structure and jurisdiction of the federal courts and the appointment of judges. In any event, after discussing a number of case types that might be transferred to state court jurisdiction (e.g., diversity, certain civil rights actions, FELA, truth-in-lending, odometer tampering, securities fraud for closely held corporations),[24] the author states that "a rigorous application of the principles of federalism would also dictate the reassigning of some, maybe a great many, cases from state courts to federal courts."[25] While the author explains why this is so, it is not clear whether he is suggesting that a less than rigorous application of the principles of federalism may be necessary in the interest of shifting cases to state courts. Implicated here, of course, are some principles that have been subject to important differences of opinion among scholars, practitioners, and judges.[26]

On the criminal side, according to the author, consistent application of federalism principles would have little effect on the criminal caseload in the federal courts.[27] Although more distinctively federal crimes would be prosecuted in the state courts if the state-federal crime overlap was di-

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21. *Id.* at 194-243; *see also* Roger J. Miner, *Federal Courts at the Crossroads*, 4 CONST. COMMENT. 251, 256-58 (1987) (providing and discussing 10 suggestions for alleviating the federal courts' overwhelming workload).

22. *See* POSNER, *supra* note 2, at 244-70.

23. *See generally* Roger J. Miner, *The Tensions of a Dual Court System and Some Prescriptions for Relief*, 51 ALB. L. REV. 151 (1987) (discussing the dual federal and state system of courts in the United States, and the relationship of the systems).

24. *See* POSNER, *supra* note 2, at 273-303.

25. *Id.* at 303.

26. *See, e.g.*, Roger J. Miner, *Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions*, 23 SETON HALL L. REV. 821 (1993).

27. *See* POSNER, *supra* note 2, at 292.

minished, the workload of the federal courts would be largely unaffected.[28] The reason, we are told, is that the volume of criminal prosecutions is a variable, dependent upon the allocation of federal prosecutors.[29] In the author's view, the limitation of federal resources accounts for the slower increase in criminal cases as compared to civil cases in the federal courts.[30] In his *minimization* analysis of the effects of the acknowledged consistent increase in the forms of anti-social conduct classified as federal crimes, an increase that includes the enlargement of federal jurisdiction over local crime, the author is hoist upon his own caseload-versus-workload petard. It may be that the criminal caseloads have not spiraled at the rate of the civil caseloads in recent years, but it is common ground among federal judges that hours spent on criminal cases often exceed the hours spent on civil cases in the course of a year.

In arguing that the growth in federal criminal proceedings has been moderate and manageable, the author purports to find some significance in the fact that the ratio of criminal cases filed to assistant United States attorneys has been dropping during the past twenty years.[31] In Table 4.3, one of many impressive looking, but often unproductive, tabulations sprinkled throughout the book, it appears that there were 1,400 assistant United States attorneys who handled a total of 43,282 criminal cases in 1975, a ratio of cases filed to assistants of 30.9 to 1.[32] In 1994, there were 4,400 assistants and 45,473 cases, a ratio of 10.3 to 1.[33] There were 4,703 assistant U.S. attorneys on the job in 1997, and the Department of Justice requested a 5.1 percent increase in positions for fiscal year 1998.[34] Extrapolating from these statistics, the author concludes that "[a] vast expansion in the corps of federal prosecutors would be necessary to bring about a dramatic increase in the number of criminal proceedings filed."[35]

One of the problems presented in this analysis is that not all the assistants are assigned to criminal cases. Moreover, it is a fact that their numbers are increasing exponentially. The reduction in ratio of cases to assistants, even assuming there has been such a reduction in regard to assistants assigned only to criminal cases, can mean only one thing—the

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28. *See id.*
29. *See id.*
30. *See id.* at 102.
31. *See id.*
32. *See id.* at 103.
33. *See id.*
34. *See DOJ Increases Reflected in Judiciary Workload*, THE THIRD BRANCH, Apr. 1997, at 5.
35. POSNER, *supra* note 2, at 102.

cases have increased in *complexity*, with concomitant effect on the federal court workload. The need to deal with the problem of federal crime overload remains a pressing one. This need was recognized by the Federal Courts Study Committee seven years ago,[36] and the need is even greater today as Congress expands the criminal jurisdiction of the federal courts.[37]

It is interesting that the author says that he is "not sure that there is any other provision of the Constitution besides Article IV [the federal government guarantee to the states of a republican form of government] that can be said with a straight face to authorize that part of the federal criminal jurisdiction [that deals with local corruption]."[38] But the Supreme Court long has had a "straight face" in approving the interstate commerce and post office provisions of the Constitution as bases for local corruption prosecution.[39] What is needed is congressional recognition of the problems the federal courts face as a consequence of the expansion of criminal jurisdiction. However, it is unrealistic to expect that Congress will be at all concerned with federal case workload in the face of what it perceives to be voter interest in more criminal prosecutions and harsher penalties.[40]

Much of what is listed under "Fundamental Reform" consists of lectures by the author to his colleagues on the federal bench. He admonishes district judges to, among other things, verify subject matter jurisdiction, delegate less authority, take a firm hand in pretrial discovery, and avoid "lawlessness," especially in institutional reform and class action litigation.[41] I am certain that district judges will be most grateful to the author for sharing these thoughts.

To those of us who are colleagues of the author on the federal appellate bench, he brings a message of our institutional responsibilities, urging us to submerge the "individualistic . . . conception of [our] role" in

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36. *See* JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 36 (1990).

37. *See, e.g.*, Roger J. Miner, *Crime and Punishment in the Federal Courts*, 43 SYRACUSE L. REV. 681, 685 (1992).

38. POSNER, *supra* note 2, at 284.

39. *See, e.g.*, United States v. Green, 350 U.S. 415, 420-21 (1956) (holding the Hobbes Act, which allows prosecution of extortion, is within Congress's Commerce Clause authority); Badders v. United States, 240 U.S. 391, 393 (1916) (permitting federal prosecution of a local crime under Congress's Post Office Clause authority).

40. *See* Roger J. Miner, *Federal Courts, Federal Crimes, and Federalism*, 10 HARV. J.L. & PUB. POL'Y 117, 128 (1987).

41. *See* POSNER, *supra* note 2, at 238-40.

the interest of the greater good.[42] And all along I thought that the individualist approach was the right one! In any event, one gets the impression from this book that the author has exempted himself from the submerging that he advocates. Further, we are instructed to avoid undue delay in the disposition of appeals, to incorporate the ideas of the concurring judge into majority opinions, to avoid excessive length as well as prolixity of footnotes in our opinions, to avoid the abuse of colleagues and of dissents, and to avoid the tendency "to deal with each case separately without worrying about the pattern or about the effects of [our] decisions taken as a whole on the health of the judicial system."[43] These instructions should go a long way toward the reform of the federal court system and the relief of its workload burdens.

The remainder of the "Reform" part of this book is small beer indeed. The author reflects upon his definitions of judicial self-restraint,[44] principled adjudication,[45] judicial activism,[46] rules compared to standards,[47] and stare decisis.[48] The author's musings in these areas are most interesting, especially his idea that when the first three circuits to decide an appeal have decided it the same way, the remaining circuits should defer.[49] It is difficult to see, however, how any of these philosophical discussions are designed to move the system toward a resolution of the quality problem engendered by a growing workload.

One would have hoped for some thoughts regarding the many proposals that have been advanced to provide a major restructuring of the appellate court system.[50] One would also have hoped for a more in-depth examination of the impact of the bar on the crisis confronting the federal court system. It seems almost certain that the huge increase in the number of lawyers has fostered a large pool of them willing to litigate cases of questionable merit. Ethical problems abound, and the problem of too many lawyers will not soon disappear. The author's theory that cases involving well-established law will be settled out of court in greater number than those involving novel questions of law is unknown to large seg-

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42. *Id.* at 366.
43. *Id.* at 350.
44. *See id.* at 304-34.
45. *See id.* at 305-14.
46. *See id.* at 314-34.
47. *See id.* at 368-71.
48. *See id.* at 371-82.
49. *See id.* at 381.
50. *See* Roger J. Miner, *Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee*, 65 ST. JOHN'S L. REV. 673, 685-88 (1991) (reviewing proposals to restructure the appellate court system).

ments of the bar. The author does have an interesting suggestion that may have an impact on the employment of lawyers—he says that we should begin thinking about the German system, which includes judicial control of fact-gathering.[51] This would require a great change in the ratio of judges to attorneys, he points out.[52] It presently is one to thirty in the United States and about one to two in Germany.[53] In this regard, according to the author, "[w]e may be in a prerevolutionary era."[54] Far out!

The author's stated intent in this book "is to describe, and as best I can explain, the system; to evaluate the proposals for improving it; and to make my own proposals for improvement."[55] The system is better described and explained in countless texts and casebooks. Most of the proposals for improvement are discussed in one form or another in the *Report of the Federal Courts Study Committee*,[56] of which the author was a member, and in law review articles. An excellent set of practical proposals for improvement, some of which already have been implemented, is found in the *Long Range Plan for the Federal Courts*, published by the Committee on Long Range Planning of the Judicial Conference of the United States (the author is a member of the Judicial Conference).[57] The Long Range Planning Committee took many of its ideas from the Federal Courts Study Committee.[58] Accordingly, there was little need for this book. The author's "hope [that] this book makes a practical contribution to the improvement of the federal courts" and his "hope [that] it advances the cause of scientific judicial administration"[59] must be considered largely unfulfilled.

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51. *See* POSNER, *supra* note 2, at 346.
52. *See id.*
53. *See id.*
54. *Id.*
55. *Id.* at xi.
56. REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 36.
57. JUDICIAL CONFERENCE OF THE U.S., LONG RANGE PLAN FOR THE FEDERAL COURTS (1995).
58. *See id.* at 2.
59. POSNER, *supra* note 2, at xiv.

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[6] See Federal Courts' Caseload, supra note 1, at 6.

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It goes without saying that workload can be measured only by hours spent on the work. Therefore, the increase in merits terminations without signed opinions in conjunction with the increase in the number of signed opinions do not in any way demonstrate an amelioration in workload. Quite the contrary. Experience as a circuit judge belies the author's conclusion that the fraction of difficult cases in the courts of appeals is declining, by whatever standard is used. There are many more cases, and no decrease in percentage of difficulty has been noted in the universe of cases. To say that a decline in the reversal rate is somehow indicative of less workload because reversal is the easy way out also runs contrary to practical experience. Long hours can be spent on a case that winds up in affirmance, either by opinion or summary order, while reversal sometimes requires less time. Generalizations do not provide a good approach to work that involves so many variables.

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appeal from summary judgment or dismissal for failure to state a claim. To say otherwise is to rely on the ipse dixits and questionable extrapolations of statistics with which this book is larded.

Despite the uncontroverted increase in caseloads and workloads undertaken by federal judges whose retired and deceased colleagues are not replaced because of the breakdown in the process of advice and consent,[8] the federal courts are coping, says the author, and coping fairly well at that. I suppose that it all depends on what one means by coping. The principal means, according to the author, is the expansion in the number and responsibilities of supporting personnel, including bankruptcy judges, magistrate judges, law clerks, staff attorneys and law student externs.

Properly noted here is the need for judges, burdened by crushing caseloads, to have clerks undertake more and more opinion drafting responsibilities. Also properly noted are the many drawbacks of a system that requires clerks to write even the first drafts of opinions. On balance, however, the author believes that opinion writing by clerks is acceptable because they "have better legal analytic capabilities" than the judges they serve.[9] If a federal judge does not have better analytic capabilities than a just-graduated clerk, the system is in even

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[8] See Roger J. Miner, Advice and Consent in Theory and Practice, 41 AM. U. L. REV. 1075, 1082-83 (1992).

[9] POSNER, supra note 2, at 157.

deeper trouble than anyone believes. The concept, of course, is nothing short of ridiculous, as is the statement that law students should be taught that in their briefing and submissions to federal courts, they will be writing for law clerks and not for judges. To most lawyers and judges, increased reliance on inexperienced law clerks is just not good coping.

Discussed at some length are other methods being used to cope with federal court volume -- curtailment of oral arguments and non-publication of opinions in the courts of appeals, the increased granting of summary judgments and motions to dismiss and the imposition of sanctions in the district courts. Taking into account these and other consequences of volume, the author poses this question: "[H]ave these consequences, which range from a massive increase in staff to a significant reduction in process, caused a substantial degradation in the quality of the federal judiciary and federal justice?"[10] The author's answer is "no," although one wonders why the question is posed in terms of substantial degradation. A little degradation would be scary enough. In any event, the author acknowledges that his view, that the system is not worse overall for the consequences described, is "heresy."[11] He writes:

> The idea that the nation will suffer if judges do not have as much time for each case as they once did is integral to the ideology of the American legal profession. Indeed, it is entwined with the central strand of that ideology -- the conception of law in all

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[10] Id. at 185.

[11] Id.

> its aspects including judging, as a craft of patient artisans.[12]

It is not only the legal profession that sees law and judging as a craft of artisans. It is the expectation of all Americans that judges will spend as much time as necessary to craft just decisions in legal disputes. This is not "artisanship," but the method we follow in the search for elusive justice. Implicated in the search are the hopes and dreams of the American people, matters that do not loom large in this book.

Part III of The Federal Courts: Challenge and Reform, entitled "Incremental Reform," is largely devoted to "palliatives," which the author describes as proposals unlikely to have more than a limited effect on caseloads. Included here are the pros and cons of such frequently discussed measures as "non-trivial fixed user fee[s],"[13] limiting or abolishing diversity jurisdiction, better management, alternative dispute resolution and reform of the bar, which includes such time-worn topics as contingent fees and 2-way fee shifting.[14] Part III concludes with a non-innovative discussion of specialized courts and various proposals for changes in the administrative review process. The reader therefore waits anxiously for the presentation of new ideas promised by the title of the final part of the book, Part IV, "Fundamental Reform." One waits in vain,

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[12] Id.

[13] Id. at 198.

[14] See, e.g., Roger J. Miner, Federal Courts at the Crossroads, 4 CONST. COMMENTARY 251, 256-58 (1987).

being treated instead to some philosophical ruminations, some "on the one hand - on the other hand" proposals and some suggestions with practically no chance of adoption.

The first chapter under "Fundamental Reform" reviews the federal courts' role in our federal system, describing, as so many have done in the past, the dual system of courts that prevails in this nation and the relationship of those courts to one another.[15] This discussion is almost as repetitious of existing literature as that found in Part I of the book, which deals with the structure and jurisdiction of the federal courts and the appointment of judges. In any event, after discussing a number of case types that might be transferred to state court jurisdiction (e.g., diversity, certain civil rights actions, FELA, truth-in-lending, odometer tampering, securities fraud for closely held corporations), the author states that "a rigorous application of the principles of federalism would also dictate the reassigning of some, maybe a great many, cases from state courts to federal courts."[16] While the author explains why this is so, it is not clear whether he is suggesting that a less than rigorous application of the principles of federalism may be necessary in the interest of shifting cases to state courts. Implicated here, of course, are some principles that have been subject to important differences of opinion among scholars,

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[15] See generally Roger J. Miner, The Tensions of a Dual Court System and Some Prescriptions for Relief, 51 ALB. L. REV. 151 (1987).

[16] POSNER, supra note 2, at 303.

practitioners and judges.[17]

On the criminal side, according to the author, consistent application of federalism principles would have little effect on the criminal caseload in the federal courts. Although more distinctively federal crimes would be prosecuted in the state courts if the state-federal crime overlap were diminished, the workload of the federal courts would be largely unaffected. The reason, we are told, is that the volume of criminal prosecutions is a variable, dependent upon the allocation of federal prosecutors. In the author's view, the limitation of federal resources accounts for the slower increase in criminal cases as compared to civil cases in the federal courts. In his minimization analysis of the effects of the acknowledged consistent increase in the forms of anti-social conduct classified as federal crimes, an increase that includes the enlargement of federal jurisdiction over local crime, the author is hoist upon his own caseload-versus-workload petard. It may be that the criminal caseloads have not spiraled at the rate of the civil caseloads in recent years, but it is common ground among federal judges that hours spent on criminal cases often exceed the hours spent on civil cases in the course of a year.

In arguing that the growth in federal criminal proceedings has been moderate and manageable, the author purports to find some significance in the fact that the ratio of criminal cases

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[17] See, e.g., Roger J. Miner, Identifying, Protecting and Preserving Individual Rights: Traditional Federal Court Functions, 23 SETON HALL L. REV. 821 (1993).

filed to assistant United States attorneys has been dropping during the past 20 years. In Table 4.3, one of many impressive looking, but often unproductive, tabulations sprinkled throughout the book, it appears that there were 1,400 assistant United States attorneys who handled a total of 43,282 criminal cases in 1975, a ratio of cases filed to assistants of 30.9:1. In 1994, there were 4,400 assistants and 45,473 cases, a ratio of 10.3:1.[18] (There were 4,703 assistant U.S. attorneys on the job in 1997, and the Department of Justice has requested a 5.1 percent increase in positions for Fiscal Year 1998.[19]) Extrapolating from these statistics, the author concludes that "[a] vast expansion in the corps of federal prosecutors would be necessary to bring about a dramatic increase in the number of criminal proceedings filed."[20]

One of the problems presented in this analysis is that all the assistants are not assigned to criminal cases. Moreover, it is a fact that their numbers are increasing exponentially. The reduction in ratio of cases to assistants, even assuming there has been such a reduction in regard to assistants assigned only to criminal cases, can mean only one thing -- the cases have increased in complexity, with concomitant effect on the federal court workload. The need to deal with the problem of federal

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[18] POSNER, supra note 2, at 103.

[19] See DOJ Increases Reflected in Judiciary Workload, THE THIRD BRANCH, Apr. 1997, at 5, 5.

[20] POSNER, supra note 2, at 102.

crime overload remains a pressing one. This need was recognized by the Federal Courts Study Committee seven years ago,[21] and the need is even greater today as Congress expands the criminal jurisdiction of the federal courts.[22]

It is interesting that the author says that he is "not sure that there is any other provision of the Constitution besides Article IV [the federal government guarantee to the states of a republican form of government] that can be said with a straight face to authorize that part of federal jurisdiction [that deals with local corruption.]"[23] But the Supreme Court long has had a "straight face" in approving the interstate commerce and post office provisions of the Constitution as bases for local corruption prosecution.[24] What is needed is congressional recognition of the problems the federal courts face as a consequence of the expansion of criminal jurisdiction.[25] However, it is unrealistic to expect that Congress will be at all concerned with federal case workload in the face of what it

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[21] REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 36 (1990).

[22] See, e.g., Roger J. Miner, Crime and Punishment in the Federal Courts, 43 SYRACUSE L. REV. 681, 685 (1992).

[23] POSNER, supra note 2, at 284.

[24] See, e.g., United States v. Green, 350 U.S. 415, 420-21 (1956) (holding the Hobbes Act, which allows prosecution of extortion, is within Congress's Commerce Clause authority); Badders v. United States, 240 U.S. 391, 367-68 (1916) (permitting federal prosecution of a local crime under Congress's Post Office Clause authority).

[25] See Roger J. Miner, Federal Courts, Federal Crimes, and Federalism, 10 HARV. J.L. & PUB. POL'Y 117, 128 (1987).

perceives to be voter interest in more crimes and harsher penalties.[26]

Much of what is listed under "Fundamental Reform" consists of lectures by the author to his colleagues on the federal bench. He admonishes district judges to, among other things, verify subject matter jurisdiction, delegate less authority, take a firm hand in pretrial discovery, and avoid "lawlessness," especially in institutional reform and class action litigation. I am certain that district judges will be most grateful to the author for sharing these thoughts.

To those of us who are colleagues of the author on the federal appellate bench, he brings a message of our institutional responsibilities, urging us to submerge the "individualistic . . . conception of [our] role"[27] in the interest of the greater good. And all along I thought that the individualist approach was the right one! In any event, one gets the impression from this book that the author has exempted himself from the submerging that he advocates. Further, we are instructed to avoid undue delay in the disposition of appeals, to incorporate the ideas of the concurring judge into majority opinions, to avoid excessive length as well as prolixity of footnotes in our opinions, to avoid the abuse of colleagues and of dissents and to avoid the tendency "to deal with each case separately without worrying about the pattern or about the effects of [our]

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[26] See, e.g., id.

[27] POSNER, supra note 2, at 366.

decisions taken as a whole on the health of the judicial system."[28] These instructions should go a long way toward the reform of the federal court system and the relief of its workload burdens.

The remainder of the "Reform" part of this book is small beer indeed. The author reflects upon his definitions of judicial self-restraint, principled adjudication, judicial activism, rules compared to standards and stare decisis. The author's musings in these areas are most interesting, especially his idea that when the first three circuits to decide an appeal have decided it the same way, the remaining circuits should defer. It is difficult to see, however, how any of these philosophical discussions are designed to move the system toward a resolution of the quality problem engendered by a growing workload.

One would have hoped for some thoughts regarding the many proposals that have been advanced to provide a major restructuring of the appellate court system.[29] One would also have hoped for a much more in-depth examination of the impact of the bar on the crisis confronting the federal court system. It seems almost certain that the huge increase in the number of lawyers has fostered a large pool of them willing to litigate cases of questionable merit. Ethical problems abound, and the

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[28] Id. at 350.

[29] See Roger J. Miner, Planning for the Second Century of the Second Circuit Court of Appeals: The Report of the Federal Courts Study Committee, 65 ST. JOHN'S L. REV. 673, 685-88 (1991).

problem of too many lawyers will not soon disappear. The author's theory that cases involving well-established law will be settled out of court in greater number than those involving novel questions of law is unknown to large segments of the bar. The author does have an interesting suggestion that may have an impact on the employment of lawyers--he says that we should begin thinking about the German system, which includes judicial control of fact-gathering. This would require a great change in the ratio of judges to attorneys, he points out. It presently is 1:30 in the United States and about 1:2 in Germany. In this regard, according to the author, "[w]e may be in a prerevolutionary era."[30] Far out!

The author's stated intent in this book "is to describe, and as best I can explain, the system; to evaluate the proposals for improving it; and to make my own proposals for improvement."[31] The system is better described and explained in countless texts and casebooks. Most of the proposals for improvement are discussed in one form or another in the Report of the Federal Courts Study Committee, of which the author was a member, and in law review articles. An excellent set of practical proposals for improvement, some of which already have been implemented, is found in the Proposed Long Range Plan for the Federal Courts, published by the Committee on Long Range Planning of the Judicial Conference of the United States (the author is a member of the

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[30] POSNER, supra note 2, at 346.

[31] Id. at xi.

Judicial Conference).[32] The Long Range Planning Committee took many of its ideas from the Federal Courts Study Committee.[33] Accordingly, there was little need for this book. The author's "hope [that] this book makes a practical contribution to the improvement of the federal courts" and his "hope [that] it advances the cause of scientific judicial administration" must be considered largely unfulfilled.[34]

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[32] JUDICIAL CONFERENCE OF THE UNITED STATES, LONG RANGE PLAN FOR THE FEDERAL COURTS (1995).

[33] See id. at 2.

[34] POSNER, supra note 2, at xiv.